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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-496

BENSON A. WOLMAN, *et al.*,

Appellants,

—v.—

MARTIN W. ESSEX, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

**BRIEF IN OPPOSITION TO APPELLEES' MOTION TO
DISMISS OR AFFIRM AND MOTION TO AFFIRM**

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-vs-

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For The Southern District of Ohio
Eastern Division

BRIEF IN OPPOSITION TO APPELLEES'
MOTION TO DISMISS OR AFFIRM AND
MOTION TO AFFIRM

This brief opposes the Motion to Dismiss
or Affirm filed by Appellees Grit, Kane,
Kowlowski and Shames, and the Motion to Affirm
filed by the Superintendent of Public
Instruction and other public appellees.

Nationwide Concern

The Motion to Dismiss or Affirm filed by the parental appellees urges that this case is not of nationwide concern (pp. 4-8). These appellees argue that this case is unimportant because "legislation similar to the Ohio Act won't solve... [nonpublic school] financial problems" (Id. at 4) and that the Federal Elementary and Secondary Education Act provides "similar services" (Id. at 6). These positions make no sense.

The fact that testing and auxiliary services and materials programs would not solve the full financial problem of the religious schools did not dissuade this Court from adjudicating the constitutionality of such programs in cases such as Meek v. Pittenger, 421 U.S. 349 (1975) and Levitt v. Committee for Public Education, 413 U.S. 472 (1973). And the fact that this appeal may touch issues which remain undecided after Wheeler v. Barrera, 417 U.S. 402 (1974), ^{1/} concerning the validity of certain programs under the Elementary and Secondary Education Act.

^{1/} See Motion to Dismiss or Affirm, p. 6. In Wheeler v. Barrera, this Court expressly left open the extent of the First Amendment problems created by the ESEA, and acknowledged that particular programs which might be introduced under the broad mandate of the federal law might pose considerable difficulties. See 417 U.S. at 425-26.

is hardly a reason for declining to grant plenary review to this appeal.

Appellees have not refuted appellants' contention that the Ohio enactment herein challenged represents an important evolutionary development in parochial assistance legislation which has the effect of authorizing programs which are effectively identical to those stricken down in Meek v. Pittenger. This Court has not shrunk from adjudicating the constitutionality of such programs.

Education Materials and Equipment

The appellees suggest that in Meek v. Pittenger textbook loans were approved while equipment and material loans were invalidated merely because of the nominal identity of the borrower: textbooks were loaned to pupils and the other items were loaned to the schools. See Motion to Dismiss, p. 6; Motion to Dismiss or Affirm, pp. 9-10. The result of the acceptance of this interpretation of Meek would be that a wall map or a laboratory could not be loaned to a non-public school, but that it could be loaned to the student body and kept at the non-public school. Appellees urge that this proposition flows ineluctably from Meek and other prior adjudications of this Court under the Establishment Clause, so that there is no need to note jurisdiction in this case. To the contrary, in view of this Court's insistence that parochial assistance programs must be measured by their substance, and that "a legalistic minuet" is to be avoided, Lemon v. Kurtzman, 403 U.S. 602, 614 (1971), appellants submit that review

by this Court is essential in order to mark out the boundaries of the child-benefit theory and explain the true basis for the distinction between the treatment accorded to textbook loans and equipment and materials loans in Meek.

Health, Diagnostic and Remedial Services

The provisions in Ohio's current enactment which establish diagnostic and remedial services to be furnished for the parochial student bodies by public personnel also present new configurations which require dispositive review by this Court. These programs too achieve by indirection that which Meek prohibited.

By separating the types of services stricken down in Meek into diagnostic and remedial categories, and providing the latter off the sectarian premises, the Ohio law presents several novel questions. For example: whether diagnostic services stand on a different footing from remedial services for First Amendment purposes so that while counseling services and the like cannot be provided under Meek, such programs as psychological diagnosis are to be permitted; whether the movement of a remedial reading program from the interior of a church school (where Meek instructs such a program cannot be conducted) a few yards to a mobile unit parked at the curb somehow erases the problems of aid to religion and excessive entanglement which have heretofore prevented such programs from passing constitutional muster; and whether the creation of special programs for parochial school pupils at sites which, though publicly owned, are not

similarly employed for public school pupils, impermissibly effects aid to a sectarian class. Cf. Committee for Public Education v. Nyquist, 413 U.S. 756, 783 n. 38 (1973).

* * * * *

Appellants submit that the positions which they have taken on the issues mentioned above and the many subsidiary issues which are encompassed in this litigation are in keeping with the previous holdings of this Court from Lemon v. Kurtzman to Meek v. Pittenger and that reversal of the decision below is required. However, even if appellants are in one or more respects, wide of the mark in their contentions, full review by this Court is required. The notion expressed in appellees' respective motions for summary disposition of this matter, that this appeal presents nothing novel of importance for this Court's adjudication, is clearly simplistic.

The questions alluded to above are substantial; and they most obviously have not been resolved by prior decisions of this Court.

CONCLUSION

For the foregoing reasons, appellants respectfully urge this Court to note jurisdiction.

Respectfully submitted,

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